CHAPTER I. LEGISLATIVE HISTORY

A. INTRODUCTION

To understand the environment in which the employment verification pilots are being conducted, one must understand the history of sanctions against the employment of undocumented immigrants, provisions for implementing sanctions, and the accompanying employment verification systems. This section looks at how employer sanctions and attendant employment verification provisions evolved and have been enacted, implemented, and studied. While providing a fairly comprehensive history, this report by no means contains an exhaustive summary of all of the events that have occurred or the studies that have been conducted on employer sanctions and employment verification. The chapter also summarizes the employment verification pilot programs that have been conducted and the events leading up to the implementation and evaluation of the voluntary, small-scale pilots established under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

B. OVERVIEW OF LEGISLATIVE HISTORY

1. EARLY EMPLOYER SANCTIONS LEGISLATION

People who are unable to meet the provisions for lawful entry to the United States have been circumventing immigration laws ever since immigration to the United States was first controlled in 1885. The volume of persons coming illegally to the United States has varied over time, but flows beginning in the late 1960s can be generally attributed to the confluence of several factors. First, world economic and demographic trends resulted in conditions that drove large numbers of people from their native countries. A comparatively favorable situation in the United States made our Nation an attractive destination. Simultaneously, the growth of communications technologies facilitated publicity about the opportunities in the United States, and improvements in transportation made travel both affordable and accessible.

Another important factor influencing increased undocumented immigration was the termination of the Bracero Program at the end of 1964. This program had served as an economic outlet for hundreds of thousands of Mexican workers who came to the United States each year to work, largely in the agricultural sector in the Southwest. It had also served as a major labor source to meet the needs of U.S. agricultural employers. However, it had become apparent that the Bracero Program was producing more workers than were needed, with growing numbers coming outside its provisions, and that it was having an adverse impact on the wages and working conditions of U.S. workers.

Realizing that employment in the United States was the objective of most undocumented migrants, Congress began investigating legislative approaches to curtail undocumented immigration. While it was illegal for a noncitizen to be in the United States without

permission, it was not a violation of law for employers to employ persons in the United States illegally.[1] In 1971, Congressman Peter Rodino introduced a bill that made hiring unauthorized workers illegal and imposed penalties on employers who broke this law. This legislation was twice considered and passed with an overwhelming majority in the House of Representatives, but the Senate Judiciary Committee never held hearings. More comprehensive reform legislation was considered in 1974 and 1975 but failed to pass either House of Congress. The primary aspects of the proposal that drew opposition were doubts about how employers would administer employer sanctions without discriminating against foreign-appearing, foreign-sounding, foreign-born, or other minority workers and how the government would be able to enforce the provisions fairly.

2. EXECUTIVE AND CONGRESSIONAL STUDY GROUPS

A series of Executive Branch policy initiatives in the 1970s examined the phenomenon of undocumented immigration and ways to control it. These initiatives are described below.

a. SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO

The first initiative was the Special Study Group on Illegal Immigrants from Mexico, an interagency group established in early 1973 and chaired by Assistant Attorney General Roger Cramton. This group, along with its Mexican counterpart, was charged with making recommendations for discouraging the flow of undocumented Mexicans to the United States, ensuring that those who reached the United States were treated humanely, and exploring cooperative efforts with Mexico. One key recommendation was for legislation that would make it illegal to knowingly hire undocumented immigrants. Although the Group's report did not explore in detail how employers would determine the citizenship status of employees, it supported a system that was not discriminatory toward minority or ethnic workers and that did not impose undue or burdensome record keeping by employers.

b. DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS

In 1975, another interagency task force, the Domestic Council Committee on Illegal Aliens, assessed the many aspects of undocumented migration and proposed recommendations. Chaired by the Attorney General, the Committee acknowledged the growing controversy over employer sanctions, especially concerning potential discrimination, the role of employers as enforcers, and the difficulty of enforcement. It nonetheless concluded that control over the problem required that the cause – the willingness of employers to hire undocumented immigrants – be addressed. The Committee therefore recommended that appropriate measures be developed to penalize employers who hire undocumented immigrants. The Domestic Council Committee made recommendations in late 1976 for a series of legislative and agency actions aimed at re-

[1] Only employers hiring under the Farm Laborer Contract Registration Act were prohibited from knowingly hiring undocumented workers. The "Texas Proviso" in Section 274 of the Immigration and Nationality Act of 1952 expressly excluded the employment of illegal aliens from the definition of "harboring," which was a felony.

examining the principles and operation of immigration policy based on further study, research, and discussion.

c. ADDITIONAL TASK FORCES AND LEGISLATION

The process begun by the Domestic Council Committee was continued by a new administration with a new interagency task force and Attorney General. In August 1977, the task force recommended that the hiring of undocumented immigrants be made illegal, the enforcement of labor standards be increased, the status of certain undocumented resident immigrants be adjusted, border control be improved, and cooperation with governments of sending countries be expanded. Legislation considering these proposals was introduced in the House and Senate, but action was not taken following committee hearings. However, Congress did pass immigration legislation in the fall of 1978 establishing yet another body, the Select Commission on Immigration and Refugee Policy, to study and evaluate immigration and refugee policy and make recommendations to the President and Congress.

d. SELECT COMMITTEE ON POPULATION

Notwithstanding the series of task forces supporting passage of employer sanctions legislation, two governmental bodies – one legislative and the other executive – were not so convinced. A congressional effort focused on the demographic dimension of migration, the Select Committee on Population, neither endorsed nor repudiated employer sanctions. However, the Committee expressed concerns about the potential effects of employer sanctions on discrimination, the use of fraudulent documents, and the movement underground of businesses relying on undocumented immigrant labor. The result was stronger endorsement for increasing border enforcement and bilateral efforts with Mexico and reducing the economic imbalance between the United States and countries from which undocumented immigrants were arriving. In keeping with its demographic agenda, the Committee also recommended that the United States help these countries reach their family planning and population goals as a means of reducing incentives to migrate.

e. THE TARNISHED GOLDEN DOOR – *CIVIL RIGHTS COMMISSION*

The U.S. Commission on Civil Rights, in its landmark report, *The Tarnished Golden Door*, recommended unequivocally against passage of employer sanctions legislation. The Commission recommended stronger enforcement of labor standards law and increased, modernized immigration law enforcement. The report argued that the likely consequences of the proposed employer sanctions law would be ineffectiveness, prescreening of job applicants, discrimination, and placement of employers in the role of immigration enforcers. The report also stated that such a law would intensify the potential for movement toward national identity documents, thereby further eroding individual privacy for all Americans.

f. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY

The Select Commission, which functioned from September 1979 through April 1981, made a comprehensive study of the major facets of immigration law. It gathered information through research, public hearings and meetings, site visits, and consultations with experts on specific issues. Since the Select Commission's membership was high level and bipartisan,[2] the Commission was expected to produce politically acceptable recommendations that would ultimately be translated into legislation and law.

In its report issued on March 1, 1981, the Select Commission recommended legislation making it illegal to hire undocumented workers. However, the Commission members were equivocal on how the provision would be enforced and the type of identification system that should support it. Although unable to recommend a verification system, the Select Commission did agree that the system should be reliable, protect civil rights and liberties, and be cost-effective. It also recommended that the Department of Labor increase enforcement of wage and working standards.

The staff of the Select Commission issued an additional report on April 30, 1981, based on the extensive information developed through its work. The staff added additional principles that should underlie any employment verification system – uniform and nondiscriminatory application, and minimal disruption of existing employer and employee patterns. The staff report went further in suggesting possible verification systems, including systems based on existing documentation, a statement of eligibility, a call-in data bank, a counterfeit-resistant card, and the Social Security card.

g. FINAL ACTION ON LEGISLATION

The Select Commission report was completed prior to the change of administrations in early 1981. It was nonetheless released in a new administration, giving rise to a new task force to review the recommendations and options available for immigration reform. The new task force also recommended support for employer sanctions legislation with a verification system based on existing documentation. Former Select Commission members Senator Alan Simpson and Congressman Romano Mazzoli introduced legislation in 1982, based largely on Select Commission recommendations. These proposals were considered for the next 2 years and passed by the Senate in 1983 and the House in 1984, but without successful negotiation in conference. In 1985, a scaled-down Simpson bill again passed the Senate. In the final days of Congress in 1986, the House version of the bill passed. This time, the conference committee was able to reach consensus leading to passage of the Immigration Reform and Control Act of 1986 (IRCA) by both the House and Senate. IRCA was signed into law on November 6, 1986.

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[2] By law, the Select Commission was made up of four cabinet members, four members of the public selected by the President, and eight members of Congress representing the majority and minority membership of the House and Senate Judiciary Committees.

IRCA pre-empted a number of State employer sanctions laws enacted in the absence of a Federal statute. By the early 1980s, 12 States had passed laws prohibiting the employment of undocumented immigrants.[3] Except in California and Kansas, where some enforcement was attempted, these laws largely relied on employers' voluntary compliance.

3. PROVISIONS OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA)

IRCA focused largely on reforming provisions of the law related to the control of illegal immigration. The law was predicated on the premise that illegal immigration would be controlled by decreasing or eliminating the U.S. jobs "magnet." This would be done by making it unlawful for employers to hire undocumented workers and by strengthening border enforcement. IRCA also established legalization programs for certain aliens who had been residing illegally in the United States prior to 1982 and for others who had worked in U.S. agriculture for at least 1 year. The Immigration and Naturalization Service (INS) granted lawful status to 3 million persons under these programs.

a. EMPLOYER SANCTIONS PROVISIONS

IRCA made it illegal for an employer to continue employing someone known to be non-work-authorized[4] or to knowingly hire, recruit, or refer for a fee individuals not authorized to work in the United States. Noncompliance with these requirements resulted in escalating civil and criminal penalties against employers. Fines for first-time violations started at $250 per unauthorized employee and increased up to $10,000 per employee for third and subsequent violations. Employers found to be engaging in a pattern and practice of knowingly hiring or continuing to employ unauthorized workers after the enactment of IRCA were subject to fines of $3,000 per employee and/or 6 months imprisonment.

b. ANTI-DISCRIMINATION PROVISIONS

As a result of years of debate and widely held concerns about the probable discriminatory impact of employer sanctions on foreign-appearing and foreign-sounding workers, IRCA included significant anti-discrimination provisions for unfair immigration-related employment practices. Specifically, IRCA prohibited employers from discriminating on the basis of national origin or citizenship status in hiring, firing, and referral or recruitment for a fee. The law also established the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the Department of Justice to investigate claims of national origin and citizenship status discrimination and to prosecute employers engaging in these practices.

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[3] Such laws were passed in California, Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, New Jersey, Vermont, and Virginia.

[4] Undocumented immigrants hired prior to the enactment of IRCA are excluded from this provision.

c. EMPLOYMENT VERIFICATION PROVISIONS

As well as setting forth penalties for employers who knowingly hire unauthorized workers, Section 274A of IRCA established a universal employment verification system. Violations of the employment verification provisions resulted in civil penalties ranging from $100 to $1,000 per employee for whom there was a violation, depending on the severity of the case.

As provided in law, the verification system is a paper form-based system in which the employee attests that he/she is a citizen or national of the United States, a lawful permanent resident, or an alien otherwise authorized to work in the United States. Employers attest that they have examined documentation that appears to be genuine and that establishes the employee's identity and authorization to work in the United States. Section 274A also sets time periods for verification, acceptable documents, retention standards, and limitations on use of the attestation form. This statutory prescription evolved into the INS Form I-9 and the verification process that remains the mainstay of employer verification.[5]

Congress recognized that the paper verification system it provided in Section 274A was not necessarily the best system for the purposes of verifying work authorization. Congress, therefore, provided for changes but set criteria for an alternative system. These criteria included the following:

- The system must reliably determine identity and authorization to work.
- Documents that may be presented must be resistant to counterfeiting and tampering.
- Use of the system is limited to determining that a person is unauthorized to work.
- Privacy and security of information must be safeguarded.
- An employee's authorization to work may only be withheld or revoked if the individual is not an authorized worker.
- The system has specified and very limited use for law enforcement purposes beyond immigration law enforcement.
- If a new card is developed for use in the verification system, it may not be used for any other purpose.

Congress levied specific notification, hearing, and action requirements before such changes could be made. However, IRCA specifically provided for demonstration projects of alternative verification systems that meet the above criteria. It also expressly prohibited development of a national identity card for this purpose.

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[5] Form I-9 appears in Appendix A.

d. VERIFICATION FOR BENEFIT PROGRAMS (SAVE)

IRCA also required INS to establish a verification program that enables agencies providing benefits and entitlements to verify the immigration status of noncitizen applicants. This program, the Systematic Alien Verification for Entitlements (SAVE) Program, was to be made generally available to Federal, State, and local benefits agencies and institutions that administer such benefits. The law mandated that certain federally funded programs participate in SAVE by verifying with INS that all noncitizen applicants were in an immigration status for which it was statutorily permissible to provide benefits under their program. This concept had been under development prior to the passage of IRCA. SAVE and its primary database, the Alien Status Verification Index (ASVI) – a system extract updated nightly from INS's primary Central Index System database – had already been tested for use by benefits agencies.[6]

4. POST-IRCA LEGISLATION

The Immigration Act of 1990 made several amendments to the IRCA provisions.[7] One provision explicitly prohibits employers from requesting more or different documents than an employee presents. In addition, an employer cannot refuse to accept documents that belong to the employee and appear to be genuine. This provision was further modified by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to stipulate that an employer's request for different documents was discriminatory only if the employer intended to discriminate.

5. POST-IRCA STUDIES OF EMPLOYER SANCTIONS AND EMPLOYMENT VERIFICATION

IRCA also included several reporting requirements.[8] It charged the General Accounting Office (GAO) with preparing a series of three reports to determine if employer sanctions were carried out satisfactorily, if they caused a pattern of discrimination against U.S. citizens or other authorized workers, and if sanctions caused an unnecessary regulatory burden on employers. If GAO found a pattern of widespread discrimination in its final report, IRCA would trigger a review by the Attorney General, the Chairperson of the U.S. Commission on Civil Rights, and the Chairperson of the Equal Employment Opportunity Commission. This task force was to review the findings and recommend to Congress appropriate legislation to deter or remedy the discrimination. Alternatively, IRCA provided a sunset provision for employer sanctions if, within the 30-day period following

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[6] The SAVE Program currently has more than 45,000 users with access to approximately 60 million ASVI records.

[7] The Immigration Act of 1990 additionally restructured the system through which legal immigrants are admitted. It also added Section 274C, which provides penalties for making, using, providing, or accepting fraudulent documents.

[8] INS was to report on the adequacy of the employment verification system provided in IRCA, changes being considered in the verification system, and the impact of enforcement on the U.S. labor market and undocumented immigration.

receipt of the GAO report, a joint resolution of Congress was passed affirming a widespread pattern of discrimination resulting solely from the implementation of employer sanctions.

a. GAO REPORTS ON IMPLEMENTATION OF EMPLOYER SANCTIONS

On March 29, 1990, GAO issued its final report, finding that the implementation of employer sanctions had resulted in a widespread pattern of discrimination against authorized workers and that a substantial amount of these discriminatory practices had apparently resulted from IRCA.[9] GAO reported that employers were selectively applying employment verification requirements, refusing to accept valid documents, and initiating discriminatory hiring practices as a result of IRCA's employer sanctions and employment verification provisions. However, GAO testified that it did not recommend the repeal of employer sanctions at that time. The agency instead advocated retention of sanctions but a lessening of employer confusion through a reduction in the number of work-authorization documents, an increase in fraud resistance for the documents retained, and a requirement that all workers use the new, more secure documents.

b. REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON IRCA-RELATED DISCRIMINATION

The Task Force on IRCA-Related Discrimination, which had been triggered by the GAO findings, submitted a report to Congress in September 1990. The Task Force made a series of recommendations that it believed would reduce discrimination if Congress chose not to repeal employer sanctions. Some recommendations related to strengthening the enforcement of the IRCA anti-discrimination provisions. Recommendations included establishing OSC regional offices, establishing penalties commensurate with those for employer sanctions violations, expanding the protected classes of aliens, and expanding OSC's authority.

Another group of recommendations was specific to improving the employment verification system, calling for simplifying and clarifying the current Form I-9 system. Specifically, the Task Force recommended reducing the number of documents that employees could show employers as proof of identity and work authorization. A particular problem identified was the large number of valid versions of the same form – employment authorization documents and permanent resident (green) cards in particular. The Task Force also recommended that the Form I-9 more clearly state that it must be used for all employees and that the employer may not specify which documents an employee must provide. Other recommendations were to expand the Department of Labor's role in enforcing verification violations and to increase employer outreach and education. Many of the Task Force's recommendations were subsequently incorporated into the Immigration Act of 1990.

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[9] The GAO findings on discrimination were controversial. Some groups believed that GAO had underestimated the extent of IRCA-related discrimination. Others found fault with GAO's study design and methodology.

c. State and Local Studies on the Local Impact of Employer Sanctions Provisions

Following implementation of employer sanctions and employment verification, numerous State and local jurisdictions studied the impact of employer sanctions and discrimination, either on their own or as advisory committees to the U.S. Commission on Civil Rights. Although these studies used different methodologies and timeframes that could not be readily compared or generalized, they typically reported significant and disturbing incidences of workplace discrimination that could be tied to confusion or lack of understanding about the employment verification provisions.

d. Nongovernment Reports on Employer Sanctions

Nongovernment policy and research organizations also actively evaluated the impact of employer sanctions and the employment verification process. Prominent among such efforts were the Program for Research on Immigration Policy at the Urban Institute and the RAND Corporation, which jointly issued numerous reports on IRCA implementation. Considering all aspects of employer sanctions from a variety of perspectives, these researchers concluded that employer sanctions had led to discrimination in the workplace, some caused by confusion and some by fear of enforcement for hiring unauthorized workers. Urban Institute researchers supported the findings of GAO and others that showed pre-existing discriminatory behavior on the part of some employers against foreign-appearing or -sounding applicants and employers and that this behavior was reinforced by employer sanctions. An increasing incidence of document fraud was also seen to be a problem undermining border control initiatives and employment verification.

While finding employer sanctions and their impacts problematic, Urban Institute researchers suggested that improvements could be made if sanctions were continued. One recommendation was a reduction in the types of documents that employees could present to employers during the verification process. A more universally used identifier – possibly the Social Security number – combined with a telephone verification system were presented as promising ways of mitigating the adverse effects of employer sanctions. The researchers also reported that employer sanctions were not adequately enforced, and probably could not be enforced against several million employers without an unreasonable amount of resources. As a result, this new workplace standard relied on voluntary compliance, targeted enforcement, and an improved employment verification system. Although far from perfect, the conclusion seemed to be that there was no good policy alternative to employer sanctions and that sanctions represented at least the semblance of control over undocumented migration.

6. POST-IRCA MOVEMENT TO REPEAL EMPLOYER SANCTIONS

Following release of the final GAO report and other studies, some members of Congress and several advocacy groups expressed interest in repealing employer sanctions because of the impact these provisions had on workplace discrimination. Legislation to repeal employer sanctions was cosponsored by Senators Edward Kennedy and Orrin Hatch and was introduced soon after release of the GAO report. The legislation called for replacing employer sanctions with considerably augmented Border Patrol enforcement against illegal entry, as well as increased enforcement of Department of Labor wage and hour regulations and INS anti-smuggling regulations. Although the Senate Subcommittee on Immigration and Refugee Affairs heard considerable testimony from immigrant advocacy groups advocating the repeal of employer sanctions, Congress did not act on legislation calling for the repeal of employer sanctions.

7. FEASIBILITY STUDIES OF ALTERNATIVE VERIFICATION SYSTEMS

a. INS ASSESSMENT OF THE FEASIBILITY OF A TELEPHONE VERIFICATION SYSTEM

Acknowledging that the paper verification system included in IRCA was not the only option available for verifying work authorization, IRCA specifically mandated that the Attorney General, in consultation with the Secretaries of Labor and Health and Human Services, study the feasibility of a telephone-based system of verification. This system was to use existing computerized data sources and instantly verify the work-authorization status of noncitizen workers. The study was to consider a variety of implementation options and issues, including use of contractors, processing times, cost-effectiveness, and privacy. A status report was to be submitted to Congress within 6 months of IRCA's enactment, with a report of findings to be submitted on the first anniversary of enactment.

INS submitted the requisite reports to Congress, indicating that a telephone verification system was indeed feasible. Such a system could be based on the ASVI database used by the SAVE Program to verify the status of immigrants for benefits agencies. The report acknowledged that some issues, such as what level of staffing was needed to complete manual secondary verifications, could not be determined until a telephone verification system was tested. Nonetheless, the report asserted that user-friendly employment verification services could be provided to employers at a reasonable cost and within the strictures of the Privacy Act.

b. SSA ASSESSMENT OF THE FEASIBILITY OF A TELEPHONE VERIFICATION SYSTEM

IRCA also required that a similar report be prepared, within 2 years of the Act's passage, by the Social Security Administration (SSA) in conjunction with the Attorney General and the Secretary of Labor. This report acknowledged the feasibility of eventually developing a telephone-based verification system that would protect privacy. The report noted that the computerized system could not be used to determine whether the documents presented to an employer belonged to the bearer. Further, SSA stated that the agency would not be able to provide work-authorization status for most noncitizens. SSA also expressed reluctance to reissue more secure Social Security cards with photographs

to approximately 210 million cardholders, especially since such cards would become outdated and require periodic reissuance. SSA suggested an alternative system under which State driver's licenses would display Social Security numbers that had been verified with SSA as part of the issuance process.

c. INS DEMONSTRATION PROJECTS – THE TVS

As part of its interest in considering other verification approaches, Congress, through IRCA, also authorized the President to undertake demonstration projects on alternative employment verification systems. On November 20, 1991, the President signed Executive Order 12781 delegating this authority to the Attorney General, with further delegation authority. The order limited each demonstration project to 3 years.

In March 1992, INS implemented its first pilot program, the Telephone Verification System (TVS), under the demonstration authority. The program involved nine volunteer employers located in the five States with the largest numbers of undocumented immigrants: California, Florida, Illinois, New York, and Texas. These employers represented many employment sectors and ranged in size from 130 to 50,000 employees. Setting the precedent for all subsequent pilots, INS required that each employer sign a Memorandum of Understanding. By doing so, the employer agreed to follow all pilot procedures, including using the system only for workers actually hired and not taking adverse action against employees while verification was pending with INS.

The TVS pilot used SAVE Program procedures and the ASVI system to verify the work authorization of employees who self-declared on INS Form I-9 that they were work-authorized noncitizens. After hiring and completing the I-9 form for a new noncitizen employee, the employer entered the employee's month and year of birth, first initial, and Alien Number into a point-of-sale device that communicated by telephone with the INS ASVI database. If the input information matched the information in the INS database, an electronic response was transmitted within seconds.

If the input information did not match, the employer completed and mailed a form, along with copies of the documents presented by the employee, to INS Immigration Status Verifiers (ISVs), who verified the employee's status manually by searching additional systems or the paper file. The ISVs were allowed 10 days to research the case and respond to the employer. On average, they took 2 days, and no cases took longer than 8 days. Notwithstanding this quick response time, several employers reported that secondary verification was required too frequently.

The TVS demonstrated that telephone verification was a feasible approach to employment verification. Of the 2,486 noncitizen hires whom pilot employers verified with INS during the year of the pilot, 72 percent were verified during the primary inquiry and the remaining 28 percent required manual secondary verification. Of all those verified, 89 percent were found to be work-authorized. INS found that 9 percent of the noncitizens verified through TVS were not work-authorized. The employers terminated two-thirds of these non-authorized workers; the remaining third did not return to work after being told about the results of the secondary verification. It is not known if some of

this latter group were, in fact, work-authorized but found it easier to quit and seek other employment rather than go to INS to contest the finding. At the time of the study, the entire group was considered to be unauthorized. Experience from subsequent pilots has shown that some members of this group might actually have been work-authorized, meaning that the total proportion of unauthorized employees identified by the TVS pilot was most likely less than 9 percent.

d. Expansion of the TVS to Additional Employers – the Telephone Verification Pilot (TVP) and the Employment Verification Pilot (EVP)

Based on the apparent success of the TVS, in 1994 INS began planning for a new pilot, the Telephone Verification Pilot, Phase II (TVP). This pilot was initiated in September 1995 and undertaken by 235 volunteer employers in the Los Angeles area[10] to test the impact of a pilot in a defined geographic area. Participating employers conducted primary verification for new noncitizen hires using a personal computer (PC) and modem to access the INS database. INS Headquarters staff personally trained the employers to use the system and provided considerable ongoing technical support. If secondary verifications were necessary, employers sent copies of the employee's immigration documents to INS for further status verification.

The TVP Phase II concept was expanded in 1996 in the Employment Verification Pilot (EVP). The EVP initially included up to 1,000 additional volunteer employers of varying size and industrial classification throughout the United States, to test the pilot in different environments. INS automated the formerly manual secondary verification process in the EVP to expedite this portion of the verification process. With the expansion of the pilot to significantly more employers, INS centralized and increased the size of the status verification function within the Los Angeles district office. A total of 1,430 employers ultimately participated in this pilot, which ended in late 2000.

8. Further Consideration of Employment Sanctions and Verification Systems – The Commission on Immigration Reform

Debate continued in the 1990s about how to conduct employment verification. The Immigration Act of 1990, which largely restructured the system for admitting legal immigrants to the United States, established the Commission on Immigration Reform to assess immigration policy and make recommendations to Congress by September 30, 1997.

The Commission issued an interim report in September 1994 supporting the reduction of the U.S. jobs magnet as a central component of a comprehensive strategy to reduce illegal migration to the United States. Finding the current Form I-9 verification system too confusing for employers and highly susceptible to fraud and discrimination, the Commission on Immigration Reform found that a better employment verification system was essential for effective enforcement of employer sanctions. During its deliberations,

[10] Specifically, these employers were located in the cities of Industry and Santa Ana.

the Commission intensely studied means for improving the Form I-9 verification system. It established five criteria by which it measured options, requiring that a system be:

- Less prone to fraud and discrimination
- Protective of civil liberties and privacy
- Less time consuming and burdensome for employers
- Cost-effective relative to the size of the problem
- Not reliant on non-secure breeder[11] documents

The Commission found that a national computerized registry using, but separate from, SSA and INS data would be the most promising option for an efficient, secure, and nondiscriminatory verification system. This registry, based on Social Security number, would be used to verify that the Social Security number was valid and belonged to the employee. The confirmation of a match would be based on limited data, including Social Security number, name, date of birth, and mother's maiden name. INS would supply information on immigration and work-authorization status and the duration of temporary employment authorization. The Commission on Immigration Reform felt confident making this recommendation because of the relative security of the Social Security number enumeration process. This process is increasingly focused on enumeration at birth for persons born in the United States, following the implementation of tax laws requiring parents to provide Social Security numbers for their child dependents. Adults seeking Social Security numbers for the first time – largely noncitizens – are required to have in-person interviews in SSA offices, and SSA verifies immigration status with INS at that time.

Under the proposed system, employers would ask for the employee's name and Social Security number and verify the information through the computer registry. In the absence of a match, the employer would request that the employee go to a local SSA office to correct the problem. The employer would not need to know the citizenship status of the employee, nor would the employer be told why the system did not produce a match.

Accordingly, the Commission recommended that the President initiate and evaluate the pilot program, under his demonstration program authority, in the five States with the largest numbers of undocumented immigrants and in several additional States. The Commission further recommended testing three means of verification – a more secure Social Security card, a counterfeit-resistant driver's license, and a telephone verification system. Each of these systems was to have built-in audit trails to flag frequent use of Social Security numbers or other problems. Similarly, both SSA and INS were to

[11] Breeder documents are documents presented in the process of obtaining other documents. For example, an individual may present a birth certificate in order to get a valid driver's license. Since birth certificates can be easily counterfeited, they are generally considered non-secure breeder documents.

continue their ongoing efforts to improve the accuracy and timeliness of their databases. The Commission believed that *prima facie* this system eliminated discrimination, since citizenship status was not an issue, and that it protected the individual by stipulating that no one be required to carry a card or present it for purposes other than verification. Finally, recognizing that such a system could not be immediately implemented, the Commission proposed that it be phased in and evaluated extensively to determine the best mechanism for national implementation.

9. THE EXECUTIVE BRANCH'S RESPONSE TO THE COMMISSION'S PROPOSAL

Following the release of the report by the Commission on Immigration Reform, INS and SSA formed a working group to determine the technical feasibility of implementing and piloting the Commission's recommendations for a national registry. As part of this analysis, INS and SSA looked at the adequacy of the agencies' existing data elements and systems for building a national employment verification database, and they outlined the requirements and timeframes for establishing a joint system. SSA and INS found that establishing such a database involved a wide variety of technical and security considerations related to creating, updating, and accessing a very large database that potentially could be accessible by millions of users.

The most important consideration was that a unified database built from SSA and INS records required a unique identifier common to both systems, one that could be used to positively link information on individuals. Such an identifier did not exist. While the SSA Numerical Identification File (NUMIDENT) is based on Social Security number, INS uses a unique Alien Number to identify individuals and records in its systems. Further, at that time INS had no statutory authority to require that noncitizens at any time provide Social Security numbers and, in fact, many noncitizens would not yet have been issued Social Security numbers when they dealt with INS.

The lack of a common identifier between the two agencies clearly made it impossible to build a unified database. Moreover, SSA did not have current citizenship status for a significant portion of its records, hindering any link between the two systems. The working group estimated that the additional steps required to create the joint computer registry proposed by the Commission, even on a pilot basis, would take at least 5 years after the enactment of legislation requiring immigrants to provide their Social Security numbers to INS.

Although the Executive Branch supported the general objectives of the Commission's recommendation, it sought an alternative proposal that would be technically feasible for SSA and INS to test. Such a proposal would need to follow the basic tenets espoused by the Commission; that is, it would have to apply universally to all hires, resist fraud and discrimination, require as little paperwork as possible, require only quick and simple tasks, lead to substantive rather than paperwork violations, and build upon existing databases and capabilities.

On February 7, 1995, President Clinton issued a directive to the heads of all Executive departments and agencies proposing "a blueprint of policies and priorities for …continuing to work to curtail illegal immigration." In addition to proposing a comprehensive border control strategy and a more effective detention and removal program, the directive called for toughening worksite enforcement. Central to this proposal was developing tests of more effective and nondiscriminatory alternatives for verifying the employment authorization of all newly hired employees based on the recommendations of the Commission on Immigration Reform. INS was directed to continue its efforts to reduce the number of documents that demonstrate noncitizen work authorization. The directive also reiterated that strong anti-discrimination measures must continue to protect the privacy and civil rights of all persons lawfully in the United States and directed an interagency effort to ensure that these rights were vigorously protected. The worksite and anti-discrimination measures in this directive formed the basis for subsequent policy making and work in the area of employment verification.

10. DEVELOPMENT OF THE SSA-INS JOINT EMPLOYMENT VERIFICATION PILOT (JEVP)

Based on the President's directive, SSA and INS continued to develop recommendations for a pilot employment verification system along the lines of the one recommended by the Commission on Immigration Reform, one that would include all newly hired employees, citizen and noncitizen alike. It was intended that the test of this alternative system would also provide valuable insights into the feasibility and desirability of building the combined registry database proposed by the Commission. Both agencies had concerns about a national system and believed that it was imperative that they test the concept and evaluate it before considering whether moving toward a national registry system was desirable.

Development of the alternative system was based on several important findings. First, SSA and INS databases were developed for different purposes and needs. SSA records include relatively straightforward information that is not changed frequently, and these records are updated within a very short timeframe. The more complicated INS systems often involve frequent status changes, require significant interim processing, and, as such, take longer to update and are more prone to error. Because of the nature of its records systems, SSA had no need for a follow-up query capability, while INS relied on a secondary verification capability to enable further automated or even manual follow-up, as necessary to ensure that the verification included complete and up-to-date information.

Second, neither SSA nor INS maintained a database that included the information required for verifying the work-authorization status of all persons hired. While the SSA database included a record for virtually all authorized workers, it did not have current work-authorization status for most noncitizens and did not necessarily have current citizenship information for foreign-born persons.

Third, INS already had on-line verification capability – through an extract of its mainframe database – for use by benefits programs and pilot employment verification systems. With more than 387 million records in its database, SSA could provide only off-line and batch responses to queries.

Finally, INS had moved from a telephone-based system to computer verification that suited its requirements far better. SSA, on the other hand, was reluctant, for security reasons, to allow access by any mode other than touchtone telephone.

With somewhat different agency needs, SSA and INS worked over a protracted period to design a joint pilot called the Joint Employment Verification Pilot (JEVP). The JEVP met the criteria established by the Commission on Immigration Reform to the extent feasible. Although neither agency needed to share data with the other for this pilot, there were many questions about which agency would verify which employees as work-authorized, and on the basis of what information. The JEVP retained the Form I-9 process for all newly hired employees. Although the Form I-9 was not originally envisioned as a part of this pilot, it was ultimately retained because of a legal opinion that the law did not exempt pilot employers from the requirement. Moreover, the Form I-9 was the only basis for enforcing the employer sanctions provisions.

Part of the difficulty in determining verification algorithms stemmed from the fact that the SSA system contained varying information on citizenship and lawful permanent resident status, depending on when a person obtained a Social Security card or last dealt with SSA. For instance, SSA started collecting citizenship status in November 1980. For those issued cards in 1990 or later, the database showed whether the person was a citizen, a lawful permanent resident,[12] or another type of noncitizen. Ultimately, the decision was fairly simple. SSA would verify work authorization for any person claiming U.S. citizenship and for persons who were coded as lawful permanent residents in the SSA database.[13] If a person was listed as a noncitizen in the SSA database but claimed U.S. citizenship on the I-9 form, the employer asked him/her to visit an SSA office and show documentation that would allow SSA to update its citizenship information. This approach created a new requirement and slightly increased the workload of SSA.

Under the joint pilot concept, volunteering employers would verify all newly hired employees by accessing SSA through a touchtone telephone with built-in security features. SSA would then confirm whether the employee information matched the name, date of birth, and Social Security number in its database; for persons known to be U.S. citizens or lawful permanent residents, the agency would also confirm authorization to work. If there was a discrepancy between the employee information and the SSA database, the employer would ask the employee to visit a nearby SSA office.

[12] As of 1995, this group included refugees. As of 2001, it includes persons *granted* asylum.

[13] SSA confirms lawful permanent resident status with INS.

For employees not confirmed by SSA, the employer would access INS through a PC, providing the employee's name, date of birth, and Alien Number. The INS system would indicate either that the employee was work-authorized or that the employer needed to submit more information to INS so that additional systems and records could be checked. If INS was still unable to confirm work authorization after that step, the employer would ask the employee to contact INS by telephone or fax or in person within the next 30 days. According to the terms of a Memorandum of Understanding signed by the employer, SSA, and INS, the employer agreed not to take any adverse action against an employee on the basis of the pending verification. Once the employee had visited INS and resolved any problems, the case would be verified. Conversely, if the employee did not visit INS or was found not to be work-authorized, the employer was notified accordingly.

INS and SSA considered the JEVP to be the closest feasible test of the recommendation made by the Commission on Immigration Reform. The pilot included verification of all newly hired employees, albeit with two separate verifications using different modes of access. It was hoped that the JEVP would reduce discrimination and certain types of fraud. The pilot did not reduce employer paperwork, since the pilot processes were added to the Form I-9 requirement. INS and SSA initiated the joint pilot in July 1997 with 38 volunteer employers; because of the near-term implementation of pilots established under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the JEVP was never expanded.

11. CIVIL RIGHTS CONCERNS ABOUT EMPLOYMENT VERIFICATION PILOT PROGRAMS

a. IMMIGRATION VERIFICATION SUBGROUP – OFFICIAL INPUT FROM REPRESENTATIVES OF THE FEDERAL CIVIL RIGHTS COMMUNITY

As a part of the initiatives under the President's 1995 directive, representatives of the Federal civil rights community conducted a high-level review on issues related to the testing of new employment verification approaches. The Immigration Verification Subgroup of the Interagency Working Group on Immigration was chaired as a subgroup under the aegis of the Domestic Policy Council by the Chairman of the Equal Employment Opportunity Commission and the Director of the Department of Health and Human Services' Office of Civil Rights. The Subgroup's September 1995 report followed a lengthy consideration of complex issues related to discrimination and employment verification. The report made recommendations for testing employment verification pilots in a fair and nondiscriminatory manner. The intent of the review was twofold: to address potential discrimination in the design of the pilots themselves and to ensure that an effective evaluation mechanism was in place to determine whether the pilots led to discrimination.

The Subgroup recommended that pilots be designed to prevent the following: denial of employment to authorized citizen and noncitizen workers, unfair burden on employees in proving their status, undue burdens that might cause employers to avoid the verification process, and unauthorized use of the verification system and the information it accessed. Moreover, since discrimination can occur at any stage of the hiring and employment

process, the Subgroup recommended that pilot design should safeguard against prescreening of applicants prior to hire, selective or inconsistent implementation of the verification process, and unauthorized use of verification information for the purpose of harassment or discrimination. The group's recommendations also included recruiting a variety of employers based on size, industry, and record of immigration and equal employment opportunity violations.

The Subgroup also suggested possibilities for accommodating these requirements. It was recommended that participating employers be required to sign a Memorandum of Understanding that defined their responsibilities and provided consequences for noncompliance. While acknowledging that education and training were critical, the Subgroup recommended that an expert from outside the Federal Government develop these materials. Additionally, the group recommended that employees have the opportunity and sufficient time to challenge nonauthorization findings and that multi-language notices explaining these rights be posted prominently in the workplace. The report also made statutory and non-statutory recommendations to safeguard the privacy of employees verified through the pilot system.

The report reiterated the need for developing baseline information on discrimination by an independent entity, followed by surveys, reviews of employer records, and matches of those records with transaction database records to evaluate the pilot programs. The Subgroup also recommended the use of "testers" throughout the hiring and employment process, to determine whether employers were discriminating against some foreign-sounding or -appearing employees. In addition, the Subgroup suggested analyzing the accuracy of databases used for verification, the reasons for non-verification of employees, and the consequences of verification for employees.

b. RACING TOWARD BIG BROTHER – *LA RAZA REPORT ON COMPUTER VERIFICATION*

About the time that the Interagency Working Group on Immigration reviewed the civil rights aspects of employment verification, the National Council of La Raza issued a major report, *Racing Toward Big Brother – Computer Verification, National ID Cards, and Immigration Control*. This report began with the premise that employer sanctions was a failed policy and that computerized employment verification systems would not stop the employment of undocumented immigrants because of flaws inherent in the system of documents on which such verification relied. Problems with the breeder documents used to obtain the more secure documents used in the verification process, La Raza feared, would ultimately lead to the establishment of a national identity card for all Americans. Moreover, the report cited the high financial costs, employer and employee burdens, and discrimination that were likely to result from a new verification system. In lieu of continuing with employer sanctions and the discriminatory and unproven verification systems, the report proposed strengthening labor law and border enforcement and providing assistance to major sending countries.

However, realizing the likelihood that employer sanctions would continue and that new verification programs would be considered, the report made additional recommendations concerning verification programs. It reiterated the importance of piloting rather than

implementing new verification systems and the necessity of protecting the employment, privacy, and civil rights of all authorized workers.

12. RENEWED CONSIDERATION OF EMPLOYMENT VERIFICATION ISSUES

Concerned about the status of employer sanctions and the adequacy of the current verification system, in 1994 the Clinton Administration began a multi-year strategy to reduce the magnet of job opportunities in the United States. This effort included making it easier for employers to verify the status of the persons they employ, targeting employer sanctions efforts at industries and employers that exploit undocumented workers, increasing the enforcement of labor laws, and expanding efforts to decrease and prosecute discrimination by employers.

a. CONGRESSIONAL ILLEGAL ALIEN TASK FORCE

While INS and SSA were developing plans to pilot alternative verification systems based on the recommendations of the Commission on Immigration Reform, action was also being considered in Congress. At the outset of the 104th Congress, the Speaker of the House created a congressional task force, made up of 46 Republicans and 7 Democrats, to make recommendations for stopping illegal immigration and to encourage undocumented migrants to return home. Chaired by Congressman Elton Gallegly, the Task Force made several recommendations in its June 1995 report, including a recommendation that each of two proposed mandatory employment verification pilots be conducted in two States. The first pilot resembled the Commission's universal registry recommendation, and the second was based on a tamper-proof Social Security card to be used by all persons seeking employment. The report called for the better of the two proposals to be implemented on a national basis following an 18-month trial.

b. FURTHER CONSIDERATION OF IMMIGRATION REFORM LEGISLATION

The findings of the Task Force supported legislation under consideration in Congress to strengthen control over illegal immigration and to increase the responsibility of persons admitted legally. Several comprehensive reform bills, introduced in both the House and the Senate, included additional steps to gain control of unlawful immigration and to ensure that persons unlawfully in the United States were removed from the country. These bills all included provisions to improve the effectiveness of employer sanctions, usually through additional investigative resources, enhanced verification systems, and more secure documentation. Verification proposals typically reflected the Commission on Immigration Reform's proposal for a unified registry through which the status of all newly hired employees would be checked. Although stipulating that the initial implementation of a verification system be a pilot program, congressional proposals generally called for phased implementation nationwide within a few years.

The Administration's bill to strengthen control of illegal immigration called for tests of alternative verification systems – without a schedule for a larger, or national, implementation – before thorough evaluation and subsequent legislative action. This approach allowed the evaluation of alternative approaches based on such factors as

discrimination, privacy, technical feasibility, cost-effectiveness, impact on employers, and effect on fraud. This approach would help to ensure that only workable programs were considered for implementation on a larger scale and within a feasible timeframe, and with mechanisms that minimized negative side effects.

13. NEW LEGISLATION AND STATUTORY PILOTS

The debate over approaches to immigration reform continued during the mid-1990s, until September 30, 1996, when the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was enacted. This was the third major immigration reform act in a decade that emphasized enforcement of and increasing penalties for violations of immigration law. It also set new restrictions on immigrants' eligibility for public benefits and imposed new requirements on persons sponsoring immigrants. Finally, the Act established three, largely voluntary, electronic employment authorization verification pilot programs to run for 4 years each:[14] the Basic Pilot, the Citizen Attestation Pilot, and the Machine-Readable Document Pilot. These pilot programs were fashioned along the lines of recent recommendations for employment verification programs. However, they did not go as far as the Commission on Immigration Reform's registry proposal, which was generally deemed to be unachievable within relatively short timeframes, or a system built solely around a secure Social Security card. Further, the pilot programs embodied the rationale favored by the Commission, the Clinton Administration, and civil rights groups for testing and evaluation before any larger scale implementation.

a. THE BASIC PILOT

The design of the Basic Pilot, the program evaluated in this report, was similar to that of the JEVP that SSA and INS were preparing to test in Chicago. IIRIRA called for the Basic Pilot to be conducted in at least five of the seven States with the largest estimated populations of undocumented immigrants. The Basic Pilot required that participating employers electronically verify the status of all newly hired employees within 3 days of hire, first with SSA and, if necessary, with INS. IIRIRA increased the integrity of the pilot program document review process by requiring that employees choosing to show a List B (identity) document and a List C (work-authorization) document must produce a List B identity document with a photograph.[15]

b. CITIZEN ATTESTATION PILOT

IIRIRA called for the second pilot, the Citizen Attestation Pilot, to be conducted in at least five States having driver's licenses or non-driver identification that meets certain standards. Such documents must contain a photograph, have security features, and be issued through a process that makes the card resistant to counterfeiting, tampering, and

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[14] The pilots were extended for 2 years under PL 107-128, enacted January 16, 2002.

[15] List A documents already included photographs and provided proof of both identity and authorization to work.

fraudulent use. Because of these requirements, the Form I-9 process has been modified for the Citizen Attestation Pilot to simplify verification procedures for persons attesting U.S. citizenship on the I-9 form. Persons attesting U.S. citizenship who show a List A document demonstrating both identity and work authorization may use only their U.S. passport. Those U.S. citizens presenting a List B document with a photograph are not required to also show a List C document. Persons not attesting U.S. citizenship must show documents as originally required under IRCA, with the exception that the List B document must contain a photograph. The Citizen Attestation Pilot was implemented in May 1999 in Arizona, Maryland, Massachusetts, Michigan, and Virginia. Participating employers electronically verify the work authorization of newly hired *noncitizen* employees only, as in the earlier TVP and EVP demonstration pilots conducted by INS. The primary difference in this pilot is that the documents shown by U.S. citizens are more secure than those that could be presented under the earlier INS pilots.

c. MACHINE-READABLE DOCUMENT PILOT (MRDP)

The final IIRIRA pilot, the Machine-Readable Document Pilot (MRDP), is identical to the Basic Pilot except that it was to be conducted in at least five States, or, if fewer, all States, using driver's licenses and identification cards containing a machine-readable Social Security number. All new employees were to be verified using either their machine-readable driver's license, if such a document was presented, or through Basic Pilot procedures, if another document or documents were presented during the verification process. After a review of State driver's license standards, INS determined that at the time the pilot was implemented, only Iowa issued a license that met the statutory standards. The MRDP was therefore implemented in Iowa in June 1999.